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Supreme Court, U.S.
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No. 96-1974

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

CREDICORP, INC., The Estate of John Rheinfrank, and Stevan W. Brown, Individually, and as Vice President of Credicorp, Inc.,
Petitioners,

V.

DEPARTMENT OF BANKING AND FINANCE, STATE OF FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Florida

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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43 pp

QUESTION PRESENTED

May Florida impose a licensing requirement and a biennial fee upon a retail installment seller that actively solicits and sells to Florida residents, but reaches the State of Florida only by United States Mail and common carrier?

LIST OF ALL PARTIES

Respondent, State of Florida Department of Banking and Finance (hereinafter Department), is an agency of the State of Florida.

Petitioner Stevan Brown is an individual. Petitioner John Rheinfrank is a deceased individual. Petitioner Credicorp, Inc., is a corporation. According to pages 24-25 of Petitioner's Exhibit 16 (Record pages 405-406), Credicorp. Inc., was owned by Marketing Investors Corp. of which Stevan A. Mammond was the sole shareholder. Pet. Exh. 16, Record 18, 18. Hereinafter, Petitioners shall be referred to as Credicorp.

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IN THE SUPREME COURT OF THE UNITED STATES
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CREDICORP, INC., The Estate of John Rheinfrank, and Stevan W. Brown, Individually, and as Vice President of Credicorp, Inc.,

Petitioners,

V.

DEPARTMENT OF BANKING AND FINANCE, STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Florida

---

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

A. Facts

The Department respectfully brings to

this Court's attention the following facts. First, this is not a case where an out-of-state seller merely sought to make sales to Florida residents. This cause involves a Texas corporation which engaged in retail installment *credit* sales to Florida residents. Although Credicorp reached the State of Florida only by United States Mail and common carrier, Credicorp has acknowledged under oath in the Petitioner's Exhibit 15, on pages 30 and 44-46 (Record pages 158, 172-74), that it has a collections section and utilizes debt collecting agencies. Pet. Exh. 15, Record 18, 18. In addition, Petitioner's Exhibit 17, on page 654 the Record, (Pet. Exh. 17, Record 19, 20), together with Petitioner's Exhibit 20, on pages 998-999 of the Record, (Pet. Exh. 20, Record 22, 22), reveals that Credicorp has offered to compensate Florida residents to solicit business on its behalf in Florida.

Second, the facts of this case do not involve the Internet. This case involves the use by Credicorp of the United States Mail and common carrier.

Third, Credicorp states on pages 7-8 of it's Petition:

> [T]he Department ... rejected the Hearing Officer's finding

> that Credicorp's solicitations operated as a fraud or deception on Florida residents.

While it is true that the Department did not find any specific Florida resident to have been defrauded, the Department's Final Order did in fact conclude that Credicorp was in violation of Fla. Stat. § 687.141(2) for making or using a *false or misleading representation that operated as a fraud or deception upon any person notwithstanding the absence of reliance.* Petitioners' Appendix at 4d, 11c. The intermediate appellate court characterized the actions of Credicorp as "deceitful." *Credicorp, Inc. v. Department of Banking and Finance*, 659 So.2d 376, 382 (Fla. 1st DCA 1995), Petitioners' Appendix at 16b. The Florida Supreme Court observed:

> In fact, absent the enforcement of Florida's regulatory scheme, it is apparent that Credicorp's solicitations of Florida citizens could continue unabated and without sanction.

Department of Banking and Finance v. Credicorp, Inc., 684 So.2d 746, 756 (Fla. 1996), Petitioners' Appendix at 26a.

B. Federal Questions Presented Below

Credicorp raises two constitutional questions for this Court's determination. The first question is whether the State of Florida may constitutionally require that out-of-state retail installment sellers obtain a retail installment sales license. Petition at i. Should the first question be answered in the negative, Credicorp raises a second question regarding whether Florida's Loan Broker Act violates the Commerce Clause. Petition at 18-19. The first issue was duly presented to the Florida courts. The second issue was not raised until after the intermediate appellate court had issued it's decision.

Specifically, before the intermediate appellate court Credicorp contended:

> that (1) the licensing provisions for retail installment sellers in sections 520.30-.42 violate the Commerce Clause in the Constitution of the United Statues; (2) even if the licensing provisions do not violate the Commerce Clause, they do not apply to Credicorp because they do not cover retail installment contracts not entered into in Florida; (3)

> because Credicorp is not a loan broker as defined in section 687.14(4), it did not violate the provisions of section 687.141 by collecting an advance fee from borrowers in exchange for its services as loan broker; and (4) the penalty imposed is unduly harsh.

659 So.2d at 377 (footnotes omitted), Petitioners' Appendix at 3b-4b.

However, three different Commerce Clause issues have been raised in this cause at different stages of this proceeding. The first pertained to the application of the Commerce Clause to Florida's Retail Installment Sales Finance Act, Chapter 520, Part II. This issue was briefed by the parties and decided by the intermediate appellate state court. 659 So.2d 379-382, Petitioners' Appendix at 9b-17b.

The second pertained to the application of the Commerce Clause to Florida's Loan Broker Act. While this issue was not briefed by the parties, it was decided by the intermediate appellate court, which stated in part:

Credicorp chose not to voluntarily submit to licensure; therefore, it was required to play by the rules found in chapter 687. The loan broker provisions, sections 687.14-687.148, viewed in light of the cases discussed in section II, *supra*, constitute a permissible exercise of Florida's police power.

....

...The statute presently under review regulates, rather than prohibits, loan brokering, and Credicorp raises no argument that it is unable to meet one of the exceptions of section 687.14, only that it may not constitutionally be required to meet one of the exceptions.

....

Under our holding in this case, interstate firms may either voluntarily comply with the Florida state licensing provisions or may comply with the substantive regulatory provisions. This case is, thus,

> different from those cases in which the out-of-state company found itself, as the result of protectionist legislation, unable, by any means to obtain the same treatment afforded to domestic companies.

659 So.2d at 383, 384, 385, Petitioners' Appendix at 20b, 21b, 23b.

The third relates to the application of the Commerce Clause to the Loan Broker Act *in light of* the holding of the intermediate appellate court against the Retail Installment Sales Act on Commerce Clause grounds. This is the issue presented by Credicorp on pages 18-19 of its Petition. Specifically, the question certified to the Florida Supreme Court by the intermediate appellate court states with emphasis added:

> MAY FLORIDA CONSTITUTIONALLY APPLY THE LOAN BROKER ACT, SECTION 687.14-687.148, FLORIDA STATUTES, TO AN OUT-OF-STATE RETAIL INSTALLMENT SELLER WHICH, *UNDER THE COMMERCE CLAUSE, MAY NOT BE COMPELLED TO BE LICENSED IN FLORIDA AS A RETAIL INSTALLMENT SALES COMPANY* UNDER 520.32, FLORIDA STATUTES?

659 So.2d at 388 (emphasis added), Petitioners' Appendix at 2a. This issue was not briefed by the parties and was not addressed by the majority opinion of the intermediate appellate court. The issue was first presented in a Motion for Certification. *See* Respondent's Appendix at 1a. Although briefed by the parties before the Florida Supreme Court, the issue was not decided by the Florida Supreme Court. 684 So.2d at 756, Petitioners' Appendix at 26a. Based upon the foregoing, only one of the two constitutional issues raised by Credicorp in its Petition was resolved by the Florida Courts.

I. THE FLORIDA SUPREME COURT, IN A UNANIMOUS DECISION, CORRECTLY DECIDED THAT THE STATE OF FLORIDA RETAIL INSTALLMENT SALES ACT DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES

A. The Florida Supreme Court's Analysis is Consistent with the Analysis Applied by this Court

The Florida Supreme Court, in a

unanimous decision, reported at *Department of Banking and Finance v. Credicorp, Inc.*, 684 So.2d 746 (Fla. 1996), Petitioners' Appendix at 1a-27a, correctly decided that the licensing provisions of the State of Florida Retail Installment Sales Act (hereinafter the Act) do not violate the Commerce Clause of the Constitution of the United States. In rendering its decision, the Florida Supreme Court noted that the test under a Commerce Clause analysis differs depending on whether the state statute is a taxing or a regulatory measure. 684 So.2d at 750-52, Petitioners' Appendix at 11a-14a. The Florida Supreme Court's analysis is entirely consistent with this Court's recent opinion in *Fulton Corp. v. Faulkner*, ___ U.S. ___, ___, 116 S. Ct. 848, 854, 133 L. Ed.2d 796, ____ (1996), which stated in part with emphasis added:

> In evaluating *state regulatory measures* under the dormant Commerce Clause, we have held that "the first step . . . is to determine whether it 'regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce.'" *Oregon Waste*

> *Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. __, __, 114 S.Ct. 1345, 1350, 128 L.Ed.2d 13 (1994) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336, 99 S.Ct. 1721, 1729, 60 L.Ed.2d 250 (1979)).

This Court then went on to note in *Fulton Corp.* that *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), applied with respect to *state taxation*.

This Court in *Oregon Waste Systems*, 114 S.Ct. at 1351, stated in part:

> Because the Oregon surcharge is discriminatory, the virtually *per se* rule of invalidity provides the proper legal standard here, not the *Pike* balancing test.

Based upon the foregoing, this Court has clearly stated that the balancing test established by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L.Ed.2d 174 (1970), applies in cases where the state statute is not discriminatory and involves a legitimate

regulatory purpose. This test balances the burden of regulating interstate commerce with the benefits which the state derives from such regulation.

The Florida Retail Installment Sales Act clearly involves a legitimate regulatory purpose. As stated by the Florida Supreme Court:

> ... [I]t was enacted to provide consumer protection for Florida residents by requiring retail installment sellers to be licensed and to abide by the regulations set out in the chapter.
>
> ....
>
> ... Pursuant to the provisions of chapter 520, it appears that the Department is attempting to prohibit misrepresentations by retailers, whether in state or out, regarding ongoing retail installment contracts with residents of the State of Florida....
>
> ....

> ... In fact, absent the enforcement of Florida's regulatory scheme, it is apparent that Credicorp's solicitations of Florida citizens could continue unabated and without sanction. We do not believe that Congress, or the Supreme Court in its interpretation of the Commerce Clause, has mandated such an outcome.

684 So.2d at 752, 755, 756, Petitioners' Appendix at 17a, 24a, 26a. Accordingly, the Florida Supreme Court upheld the Act.

As Credicorp has mounted a facial challenge to the validity of the Act, the burden is on Credicorp to prove that the Act is invalid. *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L.Ed. 2d 697, 707 (1987). Credicorp has failed to meet this burden. In fact, this Court in *California v. Thompson*, 313 U.S. 109, 116, 61 S. Ct. 930, 933 (1941), has recognized:

> Fraudulent or unconscionable conduct of those so engaged which is injurious to their patrons, is peculiarly a subject of local concern and the

appropriate subject of local regulation.

Based upon the foregoing, the Department respectfully submits that the opinion of the Florida Supreme Court is consistent with decisions of this Court and the Petition, therefore, should not be granted.

Credicorp further complains about the "undue burden of complying with complicated licensing requirements in all fifty states." Petition at 17. However, the burden of requiring retail installment sellers to familiarize themselves with the regulations in the jurisdictions where they choose to do business is not clearly excessive in light of the benefits to local consumers. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L.Ed.2d 174, 178 (1970). As similar complaints have been rejected by other courts, *see Interstate Towing Ass'n, Inc., v. City of Cincinnati, Ohio*, 6 F.3d 1154, 1165 n.13 (6th Cir. 1993); *Silver v. Woolf*, 694 F.2d 8, 13-14 (2d Cir. 1982), *cert denied* 460 U.S. 1070, 103 S. Ct. 1525, 75 L.Ed.2d 948 (1983); *Aldens, Inc. v. Ryan*, 571 F.2d 1159, 1162 (10th Cir.), *cert. denied*, 439 U.S. 860, 99 S. Ct. 180, 58 L. Ed.2d 169 (1978), it is appropriate

for this Court to do likewise.

In criticizing the Florida Supreme Court's opinion Credicorp relies primarily on *Real Silk Hosiery Mills, Inc. v. City of Portland*, 268 U.S. 325, 45 S. Ct. 525, 69 L.Ed. 982 (1925), Petition at 15, 21, *Nippert v. City of Richmond*, 327 U.S. 416, 66 S. Ct. 586, 90 L. Ed. 760 (1946), Petition at 15, 21, *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed.2d 91 (1992), Petition at 9, 11, 14, 20, 21, and *National Bella Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753, 87 S. Ct. 1389, 18 L.Ed.2d 505 (1967), Petition at 9, 11, 14, 17, 21. However, none of the above-cited cases relied on by Credicorp involves a consumer protection statute which seeks to require licensure of those persons who enter into retail installment credit transactions with state residents. Such cases are sales or use tax cases:

- *Real Silk* and *Nippert* involved out-of-state sellers that used "drummers" to sell their products.

- *Quill Corp.* and *National Bella Hess, Inc.* are use tax cases.

Credicorp also relies on *Eli Lilly and Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 81 S. Ct. 1316, 6 L. Ed.2d 288 (1961). Petition at 21, 22. However, *Eli Lilly and Co.* is neither a "drummer" nor a use tax case. In that case company representatives sought to induce one local merchant to buy from another. As a result, the United States Supreme Court found no Commerce Clause violation. In the case at bar, the fact remains that the extension of credit to Florida residents is a matter of great local concern.

> To treat [the interstate sales] factor as bringing the present situation within the drummer cases would, in my view, be substantially to extend the reach of those cases.

Id. at 288, 81 S. Ct. at 1323 (Harlan, concurring). Similarly, the Department emphasizes that it is not attempting to require the licensure of companies which merely solicit or sell consumer products to Florida residents. To apply the use tax or "drummer" cases to instances where a legitimate regulatory purpose is sought to be effectuated is a misapplication of those cases. This Court has emphasized:

> Nevertheless, it also is true that the Court has been most reluctant to invalidate under the Commerce Clause "'state legislation in the field of safety where the propriety of local regulation has long been recognized.'" *Pike v. Bruce Church, Inc., supra,* 397 U.S. at 143, 90 S.Ct. at 848, quoting *Southern Pacific Co. v. Arizona ex rel. Sullivan, supra,* 325 U.S. at 796, 65 S.Ct. at 1532 (Douglas, J., dissenting).

Raymond Motor Trans., Inc. v. Rice, 434 U.S. 429, 443, 98 S. Ct. 787, 795, 54 L.Ed. 664, 676 (1977). Based upon the foregoing, Florida's Retail Installment Sales Act is constitutional.

B. The Florida Supreme Court's Opinion is Consistent with that of Other Lower Courts

In addition to being consistent with decisions of this Court, the opinion of the Florida Supreme Court is consistent with decisions of other courts. In its opinion, the Florida Supreme Court relied upon lower court opinions which have upheld state regulatory measures. 684 So.

at 753-55, Petitioners' Appendix at 18a-23a. Although there may be conflicts in the reasoning of such courts, *compare Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977), *cert. denied*, 434 U.S. 880, 98 S. Ct. 236, 54 L.Ed.2d 161 (1977)(which applied the *Pike* balancing test), *with Center for Auto Safety, Inc. v. Athey*, 37 F.3d 139, 142-43 (4th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1401, 131 L.Ed.2d 289 (1995)(which upheld the state regulation using a use tax analysis), there is no conflict in their holdings and the Petition should not be granted on the basis of a split in the decisions of lower courts. *See also Frendale Laboratories, Inc. v. Cavendish*, 79 F.3d 488 (6th Cir. 1996)(which applied the *Pike* balancing test); *Underhill Associates, Inc. v. Bradshaw*, 674 F.2d 293 (4th Cir. 1982)(same).

C. This Court has previously Refused to Hear Cases Involving the Same or Similar Issue which is being Presented in the Case at Bar

In upholding the State of Florida Retail Sales Finance Act, the Florida Supreme Court primarily relied on three cases all of which review has been denied

by this Court: *Center for Auto Safety, Inc. v. Athey*, 37 F.3d 139 (4th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1401, 131 L.Ed.2d 289 (1995), *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977), *cert. denied*, 434 U.S. 880, 98 S. Ct. 236, 54 L.Ed.2d 161 (1977), and *California v. Fairfax Family Fund, Inc.*, 47 Cal. Rptr. 812 (Cal. Dist. Ct. App. 1964),*appeal dismissed*, 382 U.S. 1, 86 S. Ct. 34, 15 L. Ed.2d 6 (1965). 684 So.2d at 753-55, Petitioners' Appendix at 18a-23a. While the Department cannot presume to know why this Court did not review these cases, it is entirely possible that this Court may have already decided that the very question at issue is not worthy of certiorari.

II. THE LOAN BROKER ACT IS CONSTITUTIONAL AS THIS COURT HAS RECOGNIZED THE ABILITY OF STATES TO REGULATE MATTERS OF LOCAL CONCERN.

Credicorp further challenges the constitutionality of the Loan Broker Act. Petition at 18-19. The Loan Broker Act prohibits the collection of advance fees prior to the extension of credit unless the lender is licensed by an agency of the United States or the State of Florida. *See*

Fla. Stat. §§ 687.14, 687.141 (1991), Petitioners' Appendix at 3d-4d. The Loan Broker Act is constitutional, because:

> the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected.

Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 36, 100 S.Ct. 2009, 2015, 64 L. Ed.2d 702, 711 (1980); *see also Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127, 98 S. Ct. 2207, 2215, 57 L. Ed.2d 91, 101 (1978)(the Commerce Clause does not protect any particular method or operation in the retail market).

The Loan Broker Act does not discriminate against out-of-state companies in favor of in-state companies, since it requires all persons no matter where they are located to comply with the act. *See Maine v. Taylor*, 477 U.S. 131, 148 n.19, 106 S. Ct. 2440, 2453 n.19, 91 L.Ed.2d 110, 127 n.19 (1986) (A law is discriminatory if it is "motivated solely by a desire to protect local industries from out-of-state competition" or if it "discriminat[es] arbitrarily against interstate trade".). As the Loan Broker

Act is not discriminatory:

> it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative loan benefits.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 847 25 L.Ed.2d 174, 178 (1970). Furthermore, the ability of states to regulate activities which occur within their boarders has been recognized by this Court as well as other courts. *See Ferndale Laboratories, Inc. v. Cavendish*, 79 F.3d 488 (6th Cir. 1996); *Center for Auto Safety, Inc. v. Athey*, 37 F.3d 139 (4th Cir. 1994); *Interstate Towing Ass'n, Inc., v. City of Cincinnati, Ohio*, 6 F.3d 1154 (6th Cir. 1993); *Toulsey v. North American Van Lines, Inc.*, 752 F.2d. 96, 100, 103 (4th Cir. 1985); *Silver v. Woolf*, 694 F.2d 8, 11-12 (2d Cir. 1982), *cert denied* 460 U.S. 1070, 103 S. Ct. 1525, 75 L.Ed.2d 948 (1983); *Underhill Associates, Inc. v. Bradshaw*, 674 F.2d 293 (4th Cir. 1982); *Aldens, Inc. v. Miller*, 610 F.2d 538 (8th Cir. 1979), *cert. denied*, 446 U.S. 919, 100 S. Ct. 1853, 64 L.Ed.2d 273 (1980); *Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir.), *cert. denied*, 439 U.S. 860, 99 S. Ct. 180, 58 L.Ed.2d 169 (1978); *Aldens, Inc. v.*

LaFollette, 552 F.2d 745 (7th *Cir.)*, *cert. denied*, 434 U.S. 880, 98 S. Ct. 236, 54 L.Ed.2d 161 (1977); *Aldens, Inc. v. Packel*, 524 F.2d 38, 46, 49 (3d cir. 1975), *cert denied*, 425 U.S. 943, 96 S. Ct. 1684, 48 L.Ed.2d 187 (1976); *California v. Fairfax Family Fund, Inc.*, 47 Cal. Rptr. 812 (Cal. Dist. Ct. App. 1964), *appeal dismissed*, 382 U.S. 1, 86 S. Ct. 34, 15 L. Ed.2d 6 (1965). Accordingly, the Loan Broker Act is constitutional.

III. THE PETITION SHOULD NOT BE GRANTED AS NO FLORIDA COURT HAS DECIDED ALL ISSUES RAISED IN THE PETITION FOR CERTIORARI

As discussed above, the second certified question to the Florida Supreme Court provided:

> MAY FLORIDA *CONSTITUTIONALLY* APPLY THE LOAN BROKER ACT, SECTION 687.14-687.148, FLORIDA STATUTES, TO AN OUT-OF-STATE RETAIL INSTALLMENT SELLER WHICH, UNDER THE COMMERCE CLAUSE, MAY *NOT BE COMPELLED TO BE LICENSED IN FLORIDA AS A RETAIL INSTALLMENT SALES COMPANY* UNDER 520.32, FLORIDA STATUTES?

659 So.2d at 388 (emphasis added), Petitioners' Appendix at 2a. This issue was not briefed by the parties and was not addressed by the majority opinion of the intermediate appellate court. The issue was first presented in a Motion for Certification. *See* Respondent's Appendix 1a. While briefed by the parties before the Florida Supreme Court, the issue was not decided by the Florida Supreme Court. 684 So.2d at 756, Petitioners' Appendix at 26a. Although the failure of the Florida courts to decide this issue may not create a jurisdictional bar to review in this Court as the Florida Supreme Court had the "opportunity" to decide the issue, *see generally Adams v. Robertson*, 117 S. Ct. 1028 (1997), in light of the heavy workload of this Court, it seems more appropriate not to hear this case as only one of the two constitutional issues presented to this Court in the Petition was decided by the Florida courts.

IV. THE FLORIDA SUPREME COURT IS NOT TRYING TO FACILITATE A "MANIPULATION" OF THE COMMERCE CLAUSE

Credicorp alleges:

> By reclassifying the license "fee" as a regulatory measure, the Supreme Court of Florida facilitated a *manipulation* of the Commerce Clause.

Petition at 23 (emphasis added). The Department respectfully submits that it is not the Florida Supreme Court that is trying to "manipulate" the Commerce Clause. It is Credicorp which is trying to utilize the Commerce Clause in order to evade necessary and reasonable regulatory measures designed to protect Florida citizens. The intermediate appellate court characterized the actions of Credicorp as "deceitful." 659 So.2d at 382, Petitioners' Appendix at 16b. The Florida Supreme Court observed:

> In fact, absent the enforcement of Florida's regulatory scheme, it is apparent that Credicorp's solicitations of Florida citizens could continue unabated and without sanction.

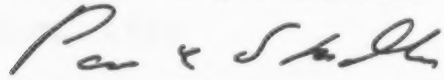
684 So.2d at 756, Petitioners' Appendix at 26a. Based upon the foregoing, the Florida Supreme Court has in effect held that the Commerce Clause is *not* an impenetrable fortress from which companies like Credicorp can act without regard to

reasonable regulations designed to protect Florida citizens. The Department respectfully requests that this Court send a clear signal by either summarily affirming the decision of the Florida Supreme Court or by denying the Petition in this cause as it has done in other regulatory cases involving Commerce Clause challenges.

V. CONCLUSION

Based upon the foregoing, the Department respectfully requests that this Court summarily affirm the decision of the Florida Supreme Court on the merits. Alternatively, the Department requests that the Petition for Writ of Certiorari be denied.

Respectfully Submitted



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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

No. 96-1974

CREDICORP, INC., The Estate of John Rheinfrank, and Stevan W. Brown, Individually, and as Vice President of Credicorp, Inc.,

Petitioners,

V.

DEPARTMENT OF BANKING AND FINANCE, STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Florida

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APPENDIX TO THE BRIEF FOR RESPONDENT IN OPPOSITION

INDEX TO APPENDIX

A. Appellants' Motion for Certification 1a

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA

Case No. 94-00440

CREDICORP, INCORPORATED, a Texas Corporation, John Rheinfrank, individually and as President of Credicorp, Inc., Stevan W. Brown, individually and as Vice President of Credicorp, Inc.,

Respondents/Appellants,

V.

STATE OF FLORIDA, DEPARTMENT OF BANKING AND FINANCE,

Petitioner/Appellee.

APPELLANTS' MOTION FOR CERTIFICATION

Appellants, Credicorp, Incorporated, John Rheinfrank, individually and as President of Credicorp, Inc., and Stevan W. Brown, individually and Vice President

of Credicorp, Inc. (hereinafter referred to collectively as "Credicorp"), by and through its undersigned counsel, respectfully move the Court pursuant to Rule 9.330, Florida Rules of Appellate Procedure, to certify that Part IV of its Opinion rendered July 17, 1995, passes on a question of great public importance and shows the Court as follows:

1. In Part IV of its Opinion, this Court held that out-of-state firms may either voluntarily comply with Florida's licensing provision for retail installment sales companies under Section 520.32, Fla. Stat. (the Retail Installment Sales Act), or alternatively, comply with the substantive regulatory provisions of Section 687.141, Fla. Stat. (the Loan Broker Act). (Slip Op. at 23). This holding appears to conflict with this Court's holding in Part II of the Opinion that the licensing provisions of Chapter 520 cannot be constitutionally applied to out-of-state retail installment sales companies because they constitute a flat-sum licensing tax in violation of Commerce Clause of the United States Constitution. *Quill Corp. v. North Dakota*, _____ U.S. ___, 112 S.Ct. 1904 (1992); *National Bellas Hess, Inc. v. Department of Revenue*

of Ill., 386 U.S. 754, 758, 87 S.Ct. 1389 (1967); *Armstrong v. City of Tampa*, 188 So.2d 195 (Fla. 1960); *Olan Mills v. City of Tallahassee*, 100 So.2d 164 (Fla. 1958), *cert. denied*, 359 U.S. 924, 79 S.Ct. 604 (1959); *City of Tampa v. Carolina Freight Carriers Corp.*, 529 So. 2d 324 (Fla. 2d DCA 1988),

2. The Court's decision creates a conflict for out-of-state retail installment sales companies like Credicorp whose only contact with the State of Florida is through common carriers and the United States mail. Under the Court's decision, these companies must either comply with the licensing provisions of Chapter 520, which is violative of the Commerce Clause, or submit to the regulatory provisions of the Loan Broker Act, which would also result in a violation of the Commerce Clause, since the Loan Broker Act treats out-of-state retail installment sellers differently from licensed in-state retail installment sellers. Specifically, under the Loan Broker Act, licensed in-state retail installment sellers are exempt from regulation under the Act. *See* § 687.14(4), Fla. Stat. Therefore, a licensed retail

installment sales company located in Florida could never be classified or regulated as a loan broker even if it charges advance fees. Conversely, under this Court's interpretation of the Loan Broker Act, an out-of-state retail installment seller that is not constitutionally required to obtain a retail installment sales license in Florida *is* a loan broker and thus subject to regulation under the Loan Broker Act for engaging in the *same* conduct as its licensed in-state counterpart. This interpretation results in impermissible discrimination against out-of-state businesses such as Credicorp under the Commerce Clause of the United States Constitution.

3. Determination of this case by the Florida Supreme Court will resolve the inherent conflict created by this Court's decision and its concomitant constitutional ramifications while also providing guidance to all similarly situated out-of-state retail installment sellers who seek to solicit business in Florida. Accordingly, Credicorp respectfully requests this Court certify the following question to the Florida Supreme Court as one of great public importance:

WHETHER FLORIDA MAY CONSTITUTIONALLY APPLY THE PROSCRIPTIONS OF THE LOAN BROKER ACT SET FORTH IN SECTIONS 687.14-.148, FLORIDA STATUTES, TO OUT-OF-STATE RETAIL INSTALLMENT SALES COMPANIES WHO ARE NOT REQUIRED TO BE LICENSED IN FLORIDA AS A RETAIL INSTALLMENT SALES COMPANY UNDER SECTION 520.32, FLORIDA STATUTES?

WHEREFORE, Appellants, Credicorp, Incorporated, John Rheinfrank, individually and as President of Credicorp, Inc., and Stevan W. Brown, individually and as Vice President of Credicorp, Inc. Credicorp, respectfully request that the Court certify its Opinion to the Florida Supreme Court as passing upon the foregoing question of great public importance.

RESPECTFULLY SUBMITTED this ____ day of August, 1995.

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